



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN COURTHOUSE



JAKUB MADEJ,

Plaintiff,

v.

SYNCHRONY FINANCIAL,

Defendant.

Case No. 1:21-cv-01894-WFK-SJB

**PLAINTIFF'S MOTION TO STRIKE
DEFENDANT'S ANSWER AND
MEMORANDUM IN SUPPORT**

Filed: July 19, 2021.

Plaintiff Jakub Madej respectfully petitions the Court for an order striking defendant's purported answer at docket entry ("DE") [13]. That "answer" is a legal nullity because it was filed after Synchrony had been defaulted for not appearing, and after plaintiff asked the clerk to enter default judgment against Synchrony for that non-appearance. By the time Synchrony filed its "answer", it lost its standing in court, and could not file any responsive pleadings (such as an answer), challenge service, or present defenses. Synchrony's answer is thus a nullity: it has been void *ab initio*, and should be struck from the record.

FACTUAL BACKGROUND

Plaintiff Jakub Madej filed this case against Synchrony Financial on April 6, 2021. DE [1]. The summons issued on April 15 commanded Synchrony to appear before this Court and answer plaintiff's complaint within 21 days after being served with process. Fed. R. Civ. P. 12(a)(1)(A)(i). The language in the summons was clear: "if you fail to respond, judgment by default will be entered against you

1 for the relief demanded in the complaint.” DE [12]. Synchrony was served with
2 said process on April 27, and had until May 18 to appear to plead or otherwise
3 defend the case. *Id.*

4 But Synchrony did not appear. It has not filed a responsive pleading or a
5 motion asserting Rule 12(b) defenses, nor has it otherwise challenged the merits of
6 the action. Synchrony has not filed a notice of appearance or communicated with
7 Plaintiff's counsel in any way. Because Synchrony had neither appeared when
8 summoned nor served an answer, Plaintiff promptly asked the Clerk to certify
9 Synchrony's default and to enter default judgment against Synchrony under Rule
10 55(b)(1). DE [10, 11, 12]. Attached to that request were affidavits certifying under
11 oath that the complaint and the summons were duly served on Synchrony. DE
12 [12].

13 More than a week later, on June 3, Synchrony suddenly reemerged, claimed
14 it knew nothing about this action, tried to persuade the plaintiff to withdraw the
15 request for default, and purported to file an answer. DE [13]. This motion seeks to
16 strike that answer.

17 LEGAL PRINCIPLE

18 A writ of summons commands the defendant to appear before the issuing
19 court and answer plaintiff's allegations within a certain period of time after being
20 served with process (in this case 21 days). A summons warns the defendant that
21 not appearing will result in a default judgment against it for the relief demanded
22 in the complaint. Fed. R. Civ. P. 4(a)(1)(E). “Default” occurs when defendant has
23 failed to plead or otherwise respond to complaint within required time period.
24
25

1 It is well-established that a defaulted defendant cannot plead unless its de-
 2 fault is set aside. *Cohen v. Rosenthal*, 2015 WL 7722391, at *2 n. 2 (D. Conn. Nov.
 3 30, 2015) (“Entry of default cuts off a defendant’s right to appear in the action, file
 4 counterclaims, and present a defense.”). “When a party is in default ... the party
 5 himself has lost his standing in court, cannot appear in any way, cannot adduce
 6 any evidence, and cannot be heard at the final hearing.” *Newhouse v. Probert*, 608
 7 F. Supp. 978, 985 (W.D. Mich. 1985) (cleaned up), quoting *Clifton v. Tomb*, 21 F.2d
 8 893, 897 (4th Cir. 1927). In particular, that party cannot answer the complaint, ad-
 9 duce any evidence, or present defenses.

10 “After an entry of default, the only procedure available to a defendant is to
 11 file a motion to set aside the entry of default or default judgment under Federal
 12 Rule of Civil Procedure 55(c) or 60(b)”. *Centorr Assocs., Inc. v. Tokyo Tokushu*
 13 *Necco, Ltd.*, No. C-88-5097-SAW, 1991 U.S. Dist. LEXIS 13897, at *9 (N.D. Cal. Sep.
 14 12, 1991); *Banks v. Kottemann L. Firm*, 2021 WL 1227619, at *8 (M.D. La. Mar. 31,
 15 2021) (collecting cases holding that a defaulted party must succeed in setting
 16 aside the default entry before it can file motions that go to the merits of the case).
 17 See also *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 160 (2d
 18 Cir. 1992) (“By choosing not to respond, [defendants] will not now be heard to
 19 deny this claim.”).

20 ARGUMENT

21 **A. Synchrony had been defaulted for not appearing and has been precluded**
 22 **from filing a responsive pleading.**

23 In the instant case, Synchrony defaulted because it did not file an answer
 24 within the allowed time, and did not appear before the Court within that time.
 25

1 Synchrony was summoned to appear by no later than May 18 and answer
2 plaintiff's complaint. Synchrony has not appeared. The docket conclusively estab-
3 lishes that no counsel filed a notice of appearance on behalf of Synchrony, and that
4 Synchrony has not filed any other paper indicating any intention of defending the
5 suit by May 18. Synchrony's time to plead expired later that day. By not appearing
6 before this Court, Synchrony has put itself in default. At that point, Synchrony lost
7 its right to file an answer, or to challenge the merits of this case. From that point
8 on, Synchrony could at most petition the Court to set the default aside, which it
9 has not done.

10 Roughly a week later, on May 24, plaintiff ask the Clerk of Court to certify
11 Synchrony's default and furnished an affidavit showing that Synchrony's failed to
12 plead or otherwise defend this case. DE [10]. Plaintiff also requested default judg-
13 ment under Rule 55(b)(1). DE [11]. At that point, Synchrony could only answer the
14 complaint if the Court sets aside the default judgment. Synchrony has not filed a
15 motion to that effect.

16 Ignoring all of the above, Synchrony purported to file an answer on June 3.
17 At that point, Synchrony was barred from filing an answer: the entry of default cut
18 off its right to appear in the action and present a defense. Its "answer" filed at
19 docket entry 13 is thus a legal nullity, and should be struck from the docket. See,
20 e.g., *Centorr*, 1991 U.S. Dist. LEXIS 13897, *supra* (striking letter and exhibits submit-
21 ted by defaulting defendant seeking to respond to plaintiff's motion for default
22 judgment and answer the complaint); *Kiesgen v. St. Clair Marine Salvage, Inc.*, 724
23 F. Supp. 2d 721, 728 (E.D. Mich. 2010) (striking defendant's third-party complaint
24 because defendant filed it after default); *J & J Sports Prods. Inc. v. Kuo*, 2007 WL
25

1 4116209, at *3 (W.D. Tex. Nov. 15, 2007) (striking an answer filed after default was
2 entered).

3
4 **CONCLUSION**

5 The Court should strike Synchrony's answer from the docket.

6
7 Respectfully submitted,

8
9 Dated: July 19, 2021

By: /s/ Jakub Madej

Jakub J. Madej (in person)

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